

No. 92-949

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States
October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.),
JOSE A. PURCELL,

Petitioners,

versus

THE COMMONWEALTH OF PUERTO RICO;
HON. MILAGROS RIVERA GUADARRAMA;
HON. LUIS SAAVEDRA SERRANO;
HON. CARLOS RIVERA MARTINEZ,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The
Commonwealth Of Puerto Rico

MOTION FOR SUMMARY REVERSAL

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MOTION REQUESTING SUMMARY REVERSAL

To the Honorable Court:

Come now Petitioners through their counsel of record and respectfully pray as follows:

A. Introduction and Summary of Argument

Respondents have virtually admitted that they are unable to defend the constitutionality of private preliminary hearings. The Solicitor General does not uphold the merits or the rationale of the 4-3 majority below. This Court should grant summary reversal of the ruling below, since respondents have made clear that they will not defend it, and petitioners continue to suffer violation of their First Amendment rights.

Instead, the Solicitor General requests a 30-day stay of these proceedings, arguing that a proposed bill amending P.R. Cr. Rule 23(c) could render this case moot. However, we must question the correctness of such a statement, because as of today there is no proposed or pending bill before the House of Representatives or the Senate of Puerto Rico, and none was pending on February 18, 1993, the date of the motion by respondents.

Even assuming that Rule 23(c) were amended to provide for open hearings as mandated by *Press-Enterprise Co. v. Superior Court*, 478 US 1 (1986), it would inescapably run afoul of the opinion below, since the privacy of the preliminary hearing has been constitutionalized by the court below.

B. Discussion

1. Summary Reversal

This Court on January 21, 1993 requested the respondents to file a brief in opposition to our petition for certiorari. They had indicated December 29, 1992 that

they would not file such a brief unless ordered to do so.¹ Since respondents chose to disregard the request and did not file an opposition brief, factual expressions contained in the petition must be taken as correct.² Our description of the functioning of the preliminary hearing, its scope, adversarial nature, etc., is admitted. Respondents will not try to persuade this Court that the proceeding is "investigative."³ They will not try to "distinguish the indistinguishable"⁴ since the acting Attorney General of Puerto Rico (intervenor-defendant in *Rivera-Puig*) has stated officially that review will not be sought in relation to the parallel federal litigation.

This course of action must be understood as an abandonment by respondents, and an admission that the ruling below is untenable. Respondents simply do not wish to be heard and have assumed a *nolo contendere* attitude before this Court. Stripped of all support, the ruling

¹ Respondents actually remarked that the reason for not filing is that the case is not "certworthy." Compare with their present position, where they state that Rule 23(c) closure will be amended.

² Respondents have formally waived the right to bring to the Court's attention any "perceived misstatements of fact or law set forth in the petition." Rule 15.1 of the Rules of this Court.

³ The Solicitor General did not propose to the court below that the Rule 23 preliminary hearing is "investigative." The court distinguished the Puerto Rico and California hearings on its own initiative, after the Solicitor General admittedly failed to do so and in fact, proposed wording for an amended rule to the Puerto Rico Supreme Court in the brief filed on February 1, 1991 on behalf of respondents.

⁴ See, p. 30 of the slip opinion of December 18, 1992 in *Rivera-Puig v. Garcia-Rosario*, in which the First Circuit held Rule 23(c) unconstitutional, after itemizing sixteen (16) similarities between the Puerto Rico and California preliminary hearings. See also our Supplemental Brief filed January 11, 1993, pp. 3-4.

below can now be clearly seen as an attempt at subverting the supremacy of this Court's decision in *Press-Enterprise II*. Due to the fact that this litigation began in November, 1989, petitioners deserve a summary reversal against respondents.

2. Reply to motion for stay of proceedings

The Solicitor General gives the impression of having had an opportunity to analyze the content of a certain proposed bill, since she states in the February 18, 1993 motion that "should Rule 23(c) be amended as proposed, the present case will become moot." Taking the motion at face value, this Court is being asked to paralyze this case purely on the strength of the Solicitor General's assertion.⁵

However, petitioners have sufficient grounds *not* to take the motion at face value. Contrary to what the Solicitor General has expressed, we are unable to find *any pending proposed bills before the Puerto Rico legislature*. None had been filed as of February 18, 1993; none had been filed and later withdrawn; none is filed as of Monday, February 22, 1993 at noon.⁶ The stay of proceedings should be denied, because its basic premise, that there is

⁵ Not a single element of the proposed bill is shared with the Court. Not a hint of its content is divulged, making it impossible for this Court to ascertain if in fact, the proposed bill passes constitutional muster. No date of filing is provided. No idea is given as to its relative complexity. No reason appears from the motion for such a mysterious way of trying to obtain a stay order.

⁶ The only proposed (not pending) bills we have knowledge of were filed in September 12 and 16, 1991. They never got out of committee, and the Eleventh Legislative Assembly adjourned on May 31, 1992. Pending matters were all dismissed, including both bills. Certified translations of both bills are included as an appendix to the foregoing, *infra*. For a discussion of the bills, see *Rivera-Puig v. Garcia-Rosario*, 785 F.Supp. 278, 282 (D- P.R. 1992).

a proposed bill pending, is incorrect. The Solicitor General should clarify what appears to be a material misrepresentation to this Court. At the very least, an explanation should be offered to the Court.

The stay should not be granted even if we were to assume, arguendo, that a bill has been proposed and that it would indeed comply with First Amendment standards. The decision of the court below constitutionalized the privacy of preliminary hearings in Puerto Rico. Until the July 8, 1992 opinion is reversed and vacated by this Court, Rule 23(c) mandatory closure cannot be set aside by legislative amendment. The Supreme Court of Puerto Rico made a balancing of constitutional interests and adjudicated the primacy of privacy and fair trial rights over access rights under the Puerto Rico Constitution:

Making a balance of interests, between the rights to a fair trial, of protection of every person as to his dignity and 'against abusive attacks to his honor, his reputation and his private or family life' and to be assisted by the presumption of innocence, on one side, and the right of the public and the press to be informed, we understand, that *under the specific circumstances covered by Rule 23(c) of Criminal Procedure, the former weigh more and should prevail.* App. 168-169 (emphasis supplied).

Simply put, the majority below not only justified private preliminary hearings; it established a relative hierarchy of constitutional rights that makes them *obligatorily private*.⁷ The facial invalidity (under the ruling

⁷ Judge Hernandez Denton, in his dissenting opinion, states that "the conceptual structure and the grounds for the majority's opinion culminate, by elevating to constitutional rank, the privacy of the preliminary hearing provided by Rule 23, ignoring its statutory genesis and limiting the power of this court and of the Legislative Assembly to revise this scheme in order to open the doors and allow the press to inform the

below) of any amended rule that would conform with *Press-Enterprise II* makes it untenable to allege that the present case would be rendered moot.⁸

C. In Conclusion

Respondents have realized that the ruling below cannot be defended. There is no further need to provide them an opportunity to be heard. The ruling below should be reversed summarily.

The request for stay of proceedings is based on information we have verified as incorrect. There is no proposed bill that would render this case moot. Besides, an amended law that complies with First Amendment standards would be contrary to the ruling below, spawning a new cycle of litigation and violation of the petitioners' First Amendment rights. For that reason, the ruling below will not become moot and must be reversed.

Respectfully submitted, this 23rd day of February, 1993.

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country about what transpires in the criminal cases. In view of the pronouncement of the Court's opinion, *if the Legislative Assembly decides to make the preliminary hearing public, it will have to perform a total revision of the proceedings, including the arraignment.* The scope of its pronouncement is damaging to the separation of powers doctrine." App. p. 224. (emphasis supplied)

⁸ See, e.g., *County of Los Angeles v. Davis*, 440 US 625 (1979); *Gannett Co. v. De Pasquale*, 443 US 368 (1979); *Nebraska Press Asso. v. Stuart*, 427 US 539 (1976), 423 US 1327, 1329 (1975); *United States v. W.T. Grant Co.*, 345 US 629 (1953). See generally, Annotation, "What Circumstances Render Civil Case, or Issues Arising Therein, Moot as to Preclude Supreme Court's Consideration of their Merits", 44 L. Ed. 2d 745.

COMMONWEALTH OF PUERTO RICO

11th Legislative Assembly

6th Ordinary Section

SENATE OF PUERTO RICO

SENATE BILL 1147

(House Bill 1407)

September 12, 1991

Presented by: Mssrs. Hernández Agosto, Deynes Soto, Rivera Ortíz, Gilberto; Orama Monroig, Peña Clos, Rigau, Mrs. Calderón de Hernández, Mr. Fas Alzamora, Mrs. González García, Miss Goyco, Mssrs. Izquierdo Stella, Martínez Cruz, Mrs. Muñoz Mendoza, Mssrs. Peña Peña, Rivera Ortiz, Juan; Rosario Burgos, Santa Aponte and Tirado Delgado.

Referred to the Committee on the Judiciary

ACT

To amend paragraph (c) of Rule 23 of Criminal Procedure in order to establish that the preliminary hearing shall be public, and circumstances in which it may be made private.

Exposition of Motives

Criminal Procedure Rule 23 adopted in 1963, as amended, establishes the right of all persons accused of a felony to the holding of a preliminary hearing before trial on the merits. Its purpose is to determine the existence or not of probable cause that a felony has been committed and that it was committed by the defendant, and to prevent that a citizen be submitted arbitrarily or without justification to the rigors of a criminal proceeding. *Pueblo*

v. Rodríguez Aponte, 116 D.P.R. 653 (1985). Although the right to a preliminary hearing is statutory and not constitutional, it has been resolved that the hearing is of judicial nature in its objectives and function. *Pueblo v. Opio Opio*, 104 D.P.R. 165 (1975).

At the present time paragraph (c) of Rule 23 establishes that "(1) the hearing shall be held privately, unless the defendant requests, at the commencement thereof, that it be public". Although the preliminary hearing is not part of the trial, it is an important and essential element of the criminal process that also merits to be of a public nature. The reasons that justify that a trial be public, also justify that the preliminary hearing be public, particularly when on many occasions the process concludes after the hearing. These are: that the defendant may be assured the protection of a fair and impartial treatment, maintain the confidence in the judicial system through public scrutiny of the actions of Judges and prosecuting attorneys, and stimulate the participation of witnesses. Further, if such an important stage of the judicial process occurs behind closed doors, it could promote the belief that this part of the process is not fair and impartial.

A preliminary hearing held in private ignores other rights that are worthy of protection: the access of the public and the press to obtain knowledge of judicial proceedings, that are qualifiedly guaranteed by the Constitution of the Commonwealth of Puerto Rico and by the First and Fourteenth Amendments to the Constitution of the United States.

On the other hand, occasions may exist in which there is a substantial probability that the constitutional right of the defendant to a fair trial could be violated if the preliminary hearing is not held in private. For the protection of this constitutional right of the defendant, exceptions are established regarding the public nature of the hearing, when there are no other reasonable an [sic] less far reaching alternatives. Also, authority is provided to allow a hearing, or part of a hearing, limiting the accesss [sic] of the public, when there is another compelling interest that so justifies it. This other exception shall require an individual case by case analysis by the Judge who presides over the hearing and the purpose is to cover situations that generally occur in proceedings involving incest, rape, sodomy, seduction, lascivious or obscene acts and indecent exposure, or for any attempted perpetration of these offenses, in which there could be a predominant interest in protecting the welfare or personal dignity of the victim or of a particular witness. In such cases several factors could be taken into consideration in making the determination, such as the age, psychological maturity, nature of the offense, the victim's wishes and the interest of the parents or close relatives.

IT IS HEREBY DECREED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Article 1. - Paragraph (c) of Rule 23 of Criminal Procedure, as amended, shall read as follows:

"RULE 23 - PRELIMINARY HEARING

(a)

(b)

(c) Procedure during the hearing: If the person appears at the preliminary hearing and does not waive it, the magistrate shall hear the evidence. **[The hearing shall be held privately, unless the defendant requests, at the commencement thereof, that it be public].** The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. The prosecuting attorney may be present at the hearing and he may also examine and cross-examine all witnesses and introduce other evidence. Upon being requested to do so, the prosecuting attorney shall put at the disposal of the person the sworn statements in his possession of the witnesses whom he called to testify at the hearing. If in the opinion of the magistrate, the evidence shows that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold him to answer for the commission of an offense in the appropriate part of the appropriate division of the Court of First Instance; otherwise the magistrate shall discharge the person and order that he be set free. The magistrate may set the defendant free on the same bail, under the same conditions, or both, that were imposed by a magistrate when the defendant was arrested, alter same, or set bail or conditions according to Rule 218(c) if such have not been previously set, and if the magistrate deems it necessary. Notwithstanding the foregoing, the magistrate shall not be able [sic] alter the bail fixed or the condition imposed by a magistrate of higher rank, unless at the preliminary hearing probable cause is determined for a lesser offense than that originally charged against defendant. After concluding the proceeding before him, the magistrate shall transmit forthwith to the clerk of the appropriate part and division of the Court of First Instance the entire file

related to the proceeding, including any bail that has been posted. The record shall show the date and place of the preliminary hearing, the persons who appeared and the decision taken by the magistrate.

The preliminary hearing shall be public unless the magistrate determines, after defendant's request, that a public hearing would entail a substantial probability of a violation of his constitutional right to a fair and impartial trial, and that there are no other reasonable and less far reaching alternatives short of a private hearing to eliminate such a probability. In such cases the decision of the magistrate shall be established in a precise and detailed manner.

Access to the preliminary hearing may also be limited when the magistrate determines after a request in that regard, that the limitation is necessary to protect any other compelling interest and that no other reasonable and less far reaching alternatives are available. The decision of the magistrate shall be established in a precise and detailed manner.

(Translator's Note: The preceding two paragraphs appear in italics in the original Spanish language document).

Article 2 – This Law shall become effective immediately after its approval and shall be applicable to any preliminary [sic] hearing held after its effective date.

COMMONWEALTH OF PUERTO RICO

11th Legislative Assembly 6th Ordinary Session

HOUSE OF REPRESENTATIVES

HOUSE BILL 1407

(Senate Bill 1147)

September 16, 1991

Presented by: Representatives Jarabo, Ramírez, Santiago García, López, Galarza, Corujo Collazo, cabán Dávila, Castro Marchand, Cepeda García, Colón Alvarado, Concepción Báez, Cruz Rodríguez, de Castro Font, Del Valle López, Díaz Gómez, Díaz Tirado, Díaz Torres, González Cruz, López Chaar, López Hernández, Maldonado Vélez, Negrón Padilla, Otero Rosario, Pérez Rivera, Rodríguez Figueroa, Rodríguez Rodríguez, Rolón Marrero, Rosa Guzmán, Rosa Ocasio, San Antonio Mendoza, Santos López, Soto Méndez Surillo Rodríguez, Tonos Florenzán, Varela Fernández, señora Vélez de Acevedo y señor Zayas Seijo.

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United States District Court
For the District of Puerto Rico

-CERTIFIED-

To be a correct translation made
and/or submitted by the interested party

/s/ Noris Vazquez Jan 24/91
Certified Court Interpreter
Administrative Office of the
United State Courts
